



Rhode Island Department of Health

NOTICE OF PUBLIC HEARING

The Director of the Rhode Island Department of Health has under consideration proposed new *Rules and Regulations Pertaining to Nursing Facility Receivership (R23-17.11-NRF)*. These proposed new regulations will be promulgated in accordance with Public Law 05-226 enacted on July 8, 2005 and Chapter 23-17.11 of the Rhode Island General Laws, as amended.

Notice is hereby given in accordance with the provisions of Chapter 42-35 of the Rhode Island General Laws, as amended, that the Director will hold a public hearing on the above mentioned matter, in the **BECK CONFERENCE ROOM** of the Cannon Building (on the lower level behind the snack bar), Rhode Island Department of Health, 3 Capitol Hill, Providence, Rhode Island on **WEDNESDAY, MARCH 8, 2006 at 9:30 A.M.** at which time and place all persons interested therein will be heard. The seating capacity of the Cannon Building room will be enforced and therefore the number of persons participating in the hearing may be limited at any given time by the hearing officer, in order to comply with safety and fire codes.

In the development of the rules and regulations, consideration was given to the following: (1) alternative approaches; and (2) overlap or duplication with other statutory and regulatory provisions. No alternative approach or duplication or overlap was identified based upon available information. The health, safety, and welfare of the public precludes any economic impact that may be incurred as a result of these regulations.

For the sake of accuracy, it is requested that statements to be made relative to any aspect of the regulations, including alternative approaches, overlap, or significant economic impact, be submitted in writing at the time of the hearing or mailed prior to the hearing date to: David R. Gifford, M.D., M.P.H., Director, Rhode Island Department of Health, #401 Cannon Building, 3 Capitol Hill, Providence, Rhode Island 02908-5097.

Copies of the regulations are available for public inspection in the Cannon Building, Room #404, Rhode Island Department of Health, 3 Capitol Hill, Providence, Rhode Island, on the Department's website: www.health.ri.gov/hsr/regulations/index.php or the Secretary of State's website: www.rules.state.ri.us/rules/, by calling 401-222-1039, or by e-mailing: LizS@doh.state.ri.us.

The Cannon Building is accessible to the handicapped. Individuals requesting interpreter services for the hearing impaired must notify the Office of Health Services Regulation at 401-222-1600 (Hearing/speech impaired, dial 711) at least 72 hours prior to the hearing.

Signed this 30th day of January 2006

David R. Gifford, M.D., M.P.H., Director of Health

RULES AND REGULATIONS
PERTAINING TO
NURSING FACILITY RECEIVERSHIP
(R23-17.11-NFR)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF HEALTH

FEBRUARY 2006 (PROPOSED)

COMPILER'S NOTE:
Statutory language noted in italics.

INTRODUCTION

These rules and regulations are promulgated under the authority of Chapters 23-17.11 and 42-35 of the General Laws of Rhode Island, as amended, and are established for the purpose of adopting prevailing standards to ensure quality care for citizens of the state by vesting in the Department the power necessary to regulate nursing facilities and provide appropriate legal remedies to provide quality of care for residents in nursing care facilities.

Pursuant to the provisions of section 42-35-3(c) of the General Laws of Rhode Island, as amended, consideration was given to: (1) alternative approaches to the regulations; and (2) duplication or overlap with other state regulations. No alternative approach, overlap or duplication nor any significant economic impact was identified; consequently the regulations are adopted in the best interest of the health, safety and welfare of the public.

TABLE OF CONTENTS

	<i>Page</i>
1.0 Definitions	1
2.0 General Requirements	2
3.0 Mismanagement of Facility	3
4.0 Reports---Use of Experts---Costs	4
5.0 Liens	4
6.0 Retaliation Prohibited	4
7.0 Whistleblower Protections	5
8.0 Penalties	6
9.0 Severability	6

Section 1.0 **Definitions**

Wherever used in these rules and regulations, the following terms shall be construed as follows:

- 1.1 **"The Act"** means Chapter 23-17.11 of the Rhode Island General Laws, as amended, entitled, "The Nursing Facilities Receivership Act."
- 1.2 **"Controlling person"** means any person or entity in control of a nursing facility directly or indirectly, including:
 - a) *in the case of a corporation or a limited liability company, or limited liability partnership, a person having a beneficial ownership interest of five percent (5%) or more in the corporation, limited liability company or limited liability partnership to which the facility is licensed;*
 - b) *in the case of a general partnership or limited partnership, any general partner;*
 - c) *in the case of a limited liability company, or limited liability partnership any member;*
 - d) *a legal entity that operates or contracts with another person for the operation of a nursing facility or an owner thereof;*
 - e) *each of the president, vice president, secretary and treasurer of a corporation that is not exempt from taxation under section 501(a) of the United States Internal Revenue Code as an organization described in section 501(c)(3) of such code; and*
 - f) *such other ownership interest or relationship as may be determined by the Director.*
- 1.3 **"Department"** means the Rhode Island Department of Health.
- 1.4 **"Director"** means the Director of the Rhode Island Department of Health.
- 1.5 **"Facility"** means any nursing facility as defined in Chapter 17 of Title 23 and the regulations adopted under Chapter 17 of Title 23.
- 1.6 **"Financial solvency"** means the ability of a nursing facility to meet its financial obligations.
- 1.7 **"Mismanagement"** means the Director's determination that a facility lacks financial solvency or has demonstrated the inability to correct patterns of deficiencies in resident care or management. These deficiencies may be evidenced by excessive turnover and instability in the administration and clinical leadership, a consistent pattern of maintaining inadequate direct care and support service personnel or a demonstrated failure to implement a plan of correction and/or remediation as prescribed by the Department.
- 1.8 **"Nursing facility"** means a place, however named, or an identifiable unit or distinct part thereof that provides 24 hour in-resident nursing, therapeutic, restorative or preventive and supportive nursing care services for two (2) or more residents unrelated by blood or

marriage whose condition requires continuous nursing care and supervision. “**Nursing facility**” and “**facility**”, as used herein, shall have the same meaning.

- 1.9 ***"Person"** means any individual, trust or estate, partnership, limited liability company, limited liability partnership, corporation (including associations, joint stock companies and insurance companies), state or political subdivision or instrumentality of a state.*
- 1.10 ***"Resident"** means a person who resides in a nursing facility as defined in Chapter 17 of Title 23 and the regulations adopted pursuant to Chapter 17 of Title 23.*

Section 2.0 **General Requirements**

- 2.1 *The Director shall have proper standing and is authorized to bring suit in the Superior Court to enforce the provisions of the Act. The Attorney General or his or her designee shall represent the Director in the proceeding, including any ancillary proceeding and any appeals resulting from the proceeding.*
- 2.2 *The facility shall be responsible for all costs associated with the Act in an amount to be determined by the Director or the Attorney General, subject to the approval of the Superior Court.*
- 2.3 *For the purposes of the Act, any nursing facility licensed under Chapter 23-17 of the Rhode Island General Laws, as amended, shall provide on demand to the Director, the Director of the Department of Human Services and the Attorney General any and all documents referring or relating to the financial management of the facility, including, but not limited to; liens; Medicaid cost reports; accounts receivable; accounts payable; monthly unaudited financial statements; audited, reviewed or compiled financial statements as prepared in the ordinary course of business; contracts with related parties; tax returns related to indebtedness; payroll and staffing; state taxes and federal taxes.*
- 2.4 In determining financial solvency, the Department shall consider the following criteria:
- a) *Sufficient liquid resources, including anticipated accounts receivable due from providing care to residents to operate the facility for thirty (30) days;*
 - b) *Current to agreed-upon payment terms for all material financial obligations of the facility including, but not limited to, mortgage payments, lease payments, management contracts, payments to employees and for all employee benefit programs, payments for food and other resident supplies, payments for utilities and payments of all state and federal taxes;*
 - c) *Free from lien resulting from default by the facility;*
 - d) *No combination of current indebtedness totaling more than one hundred twenty (120) days of total facility revenues;*
 - e) *Significant operating losses for two (2) successive years;*

- f) *Frequent requests for advances on Medicaid reimbursement;*
- g) *Unfavorable working capital ratios of assets to liabilities;*
- h) *High proportion of accounts receivable more than ninety (90) days old;*
- i) *Increasing accounts payable, unpaid taxes and/or payroll related costs;*
- j) *Minimal or decreasing equity and/or reserves;*
- k) *High levels of debt and high borrowing costs; and/or*
- l) *any other factors deemed relevant by the Director.*

Duty to Cooperate

2.5 *The facility has a duty to cooperate with the Director and the Attorney General in all aspects as related to the Act.*

Section 3.0 *Mismanagement of Facility*

- 3.1 *Whenever the Director shall determine that a facility is being mismanaged or operated in a manner which will have a detrimental impact on the health, safety, or well-being of any residents of a facility, and that the appointment of a receiver would facilitate the protection of health, safety, or well-being of the residents of the facility, the Director shall petition the Superior Court for the appointment of a receiver.*
- 3.2 *The Court shall appoint a receiver if it determines that the appointment of a receiver is necessary or appropriate to the protection of the health, safety, and well-being of the persons.*
- 3.3 *The Court shall appoint as a receiver any person(s) who shall have experience in the delivery of health care services, and, if feasible, shall have experience with the operation of long-term care facilities.*
- 3.4 *A receiver shall not have a financial interest in, or any affiliation with, the facility that is the subject of the receivership including, but not limited to, its owners, licensee, management company, employee(s), agent(s), or related party(ies). The Court may, as it deems necessary or appropriate to accomplish the purposes of the Act, confer upon any receiver appointed under this section any or all of the following powers:*
 - a) *All power under common law and the laws of this state and the rules of its courts regarding receiverships generally;*
 - b) *The power to continue to operate the facility for the benefit of the residents of the facility;*
 - c) *The power to sell the facility with the approval of the Court; and/or*

- d) *The power to facilitate the safe and orderly removal and placement of all residents of the facility in a manner which will not be detrimental to the health and safety of the residents.*

3.5 *Every plan for closure of a facility shall be subject to approval by the Court.*

3.6 *Upon the removal of the last resident from a facility, the licensee shall forfeit his or her license to operate the facility.*

Section 4.0 *Reports -- Use of Experts – Costs*

4.1 *The Department or the Department of Attorney General may, in effectuating the purposes of the Act, engage experts or consultants, including, but not limited to, accountants, auditors, nursing home administrators, medical doctors, nurses or industry analysts. All copies of reports prepared by experts and consultants, and costs associated with these reports, shall be made available to the facility and to the public.*

4.2 *All costs incurred under the Act and the rules and regulations herein shall be the responsibility of the facility in an amount to be determined by the Attorney General or the Director, as they deem appropriate.*

Section 5.0 *Liens*

5.1 *The state shall have a lien for reasonable costs incurred pursuant to the Act on the following property:*

- a) *the building in which the facility is located if owned by a controlling person;*
- b) *the land on which the facility is located if owned by a controlling person; and*
- c) *any fixtures, equipment or goods used in the operation of the facility if owned by a controlling person.*

5.2 *Such lien shall be prior to any mortgage or lien which the Court finds has been executed or obtained for a fraudulent purpose or to hinder or delay creditors. Such lien shall also be prior to a mortgage or lien held by any person with an ownership interest in the nursing facility; or held by any controlling person.*

Section 6.0 *Retaliation Prohibited*

6.1 *No discriminatory, disciplinary or retaliatory action shall be taken by the facility against any officer or employee of a facility; or against any guardian or family member of any resident; or against any resident of the facility; or against any volunteer, for any communication by him or her with the Director or the Attorney General or their designees pursuant to the provisions of the Act. The identity of individuals who ask to remain anonymous shall be protected. All anonymous communications shall be investigated but shall not constitute the sole basis for disciplinary action by the Director or the Attorney General.*

Enforcement

- 6.2 *Any person who believes that he or she has been retaliated or discriminated against in violation of section 6.1 may file a civil action within three (3) years of the date of retaliation or discrimination.*

Remedies

- 6.3 *If the Court determines that violation has occurred, the Court may order the person who committed the violation to:*
- a) *Pay compensatory damages, costs of litigation and attorneys' fees; and/or*
 - b) *Take other appropriate actions to remedy any part retaliation or discrimination.*

Limitation

- 6.4 *The protections of this section shall not apply to any person who knowingly or recklessly provides substantially false information to the Director or the Attorney General or their designees.*

Section 7.0 *Whistleblower Protections*

Prohibition Against Discrimination

- 7.1 *No person subject to the provisions of the Act and the rules and regulations herein may discharge, demote, threaten or otherwise discriminate against any person or employee with respect to compensation, terms, conditions or privileges of employment as a reprisal because the person or employee (or any person acting pursuant to the request of the employee) provided or attempted to provide information to the Director or his or her designee or to the Attorney General or his or her designee regarding possible violation of the Act and the rules and regulations herein.*

Enforcement

- 7.2 *Any person or employee or former employee subject to the provisions of the Act who believes that he or she has been discharged or discriminated against in violation of section 7.1 may file a civil action within three (3) years of the date of discharge or discrimination.*

Remedies

- 7.3 *If the Court determines that a violation has occurred, the Court may order the person who committed the violation to:*
- a) *Reinstate the employee to the employee's former position;*
 - b) *Pay compensatory damages, costs of litigation and attorneys' fees ; and/or*
 - c) *Take other appropriate actions to remedy any past discrimination.*

Limitation

- 7.4 *The protections of this section shall not apply to any person or employee who :*
- a) *Deliberately causes or participates in the alleged violation of law or regulation; or*
 - b) *Knowingly or recklessly provides substantially false information to the Director or the Attorney General or his or her designees.*

Section 8.0 *Penalties*

- 8.1 *Any facility or person that intentionally fails to comply with sections 23-17.11-4(c) and (d), 23-17.11-7 and 23-17.11-8 of the Act and sections 2.2, 2.3, 2.4, 4.1, and 4.2 herein, shall be guilty of a misdemeanor and punished by a fine of not more than one thousand dollars (\$1,000) or imprisoned for not more than one (1) year.*
- 8.2 *Each day of violation shall constitute a separate and distinct offense for calculation of the penalty. Each controlling person of a facility subject to penalties under this section shall be severally and personally liable for any fine, penalty or imprisonment provided in this section for violating sections 23-17.11-4(c) and (d), 23-17.11-7, and 23-17.11-8 of the Act and sections 2.2, 2.3, 2.4, 4.1, and 4.2 herein.*

Section 9.0 *Severability*

- 9.1 *If any provision of these rules and regulations or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect the provisions or application of the rules and regulations which can be given effect, and to this end the provisions of the rules and regulations are declared to be severable.*

*Monday, January 30, 2006
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